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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1124

BIGGS RENTAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner brought this suit against the United States in the Court of Claims seeking compensation for the alleged taking of certain personal property or, alternatively, restitution and rent (Pet. App. 4). The court dismissed the petition, finding that the government had not taken the property in question (Pet. App. 12) and that petitioner had neither shown that it was entitled to rent nor proven the fair rental value of its property (Pet. App. 13). The decision below,

which turns on the particular facts of this case, was correct and does not warrant review by this Court.

Petitioner leased household furniture and television antennas to military personnel who rented unfurnished apartments at Fort Ord Military Reservation from two "Wherry" corporations [1] (Fdg. 6, Pet. App. 15-16), which were owned by the same parent corporation and operated by the same personnel as was petitioner (Fdgs. 7 & 8, Pet. App. 16). Persons renting apartments in the projects in question were not required to rent furniture or television antennas (Fdg. 9, Pet. App. 16).

On November 1, 1957, the United States condemned the two Fort Ord Wherry housing projects as part of the process of converting to the Capehart program of military housing.[2] Petitioner was not named as a defendant in the condemnation suit and was not mentioned in the declarations of taking (Fdg. 14, Pet. App. 22). As a result of the fact that several government offices handled different phases of the acqui-

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[1] Under the Wherry Act, 63 Stat. 570, 12 U.S.C. 1748 *et seq.*, privately owned sponsor corporations leased land from the government on which they built housing to be rented to military personnel. The Act, which provides certain financial and insurance benefits, requires a separate corporation for each project.

[2] Under the Capehart Housing Act, 69 Stat. 646, 12 U.S.C. 1748, *et seq.*, the government itself owns and operates housing on or near military bases. To protect owners of the older Wherry housing, Congress provided that the government must acquire all Wherry housing projects located on or near military bases at which construction of Capehart housing was authorized. Housing Amendments of August 7, 1956, 70 Stat. 1111, 42 U.S.C. 1594a(b).

sitions and their attendant negotiations, there was some evidence of confusion on the part of certain government officials in the period immediately following November 1, 1957, as to the extent of the taking with regard to the Wherry corporations' personal property (Fdg. 16, Pet. App. 25-26). By Monday, November 4, however, the responsible Army officials had made clear their position that the only personal property included in the taking was that owned by the two Wherry corporations and subject to certain chattel mortgages (Fdg. 17, Pet. App. 29-30). These items were mainly ranges, refrigerators and window shades which were installed in the housing units; none of petitioner's furniture or television antennas was included.[3]

On November 7, 1957, counsel for the Wherry corporations asserted in the condemnation proceeding that petitioner's property, as well as the property of the two corporations, had been condemned (Fdg. 18, Pet. App. 32-33). The district court rejected this contention and held that petitioner had no interest in any of the property included in the complaint or the declarations of taking (Fdg. 14, Pet. App. 22).

The district court's ruling on the meaning of the documents filed there by the government precludes further consideration of that issue. Therefore, petitioner's reliance on cases concerning the interpretation of condemnation complaints and declarations of taking (Pet. 14-15) is misplaced. The only issue in this

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[3] The Wherry corporations themselves were not permitted to rent furniture or television antennas to their tenants (Fdg. 6, Pet. App. 15).

case is the purely factual one whether there was such a physical seizure of petitioner's personal property as to obligate the government to provide compensation. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609, 622-623; *City of Fresno* v. *California*, 372 U.S. 627, 629; *United States* v. *Dow*, 357 U.S. 17, 21; *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 165-166; *United States* v. *Causby*, 328 U.S. 256, 261-262; *United States* v. *Commodore Park*, 324 U.S. 386, 390; *Marion & Rye Valley Railway Company* v. *United States*, 270 U.S. 280, 282-283.

The court below found as follows (Fdg. 23, Pet. App. 41):

> None of the plaintiff's property was directly used by the Army. Furniture and television antennas at the apartment units continued to be used by the tenants until removed to the warehouses sometime between November 1 and December 15, 1957. No Government official or representative, orally or in writing, told any of the plaintiff's officials that the plaintiff could not continue its rental business or that it could not remove its personal property. Conversely, the plaintiff's officials were not told that they could continue its rental business or that it could remove its property.
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> The Army authorities did not use the master television antenna system; it was inoperative at all times pertinent to this action. It was physically located on telephone and electric light poles [for which plaintiff has continued to pay pole rental (Fdg. 13(a), Pet. App. 19)].

As to petitioner's claim that the government kept its property in warehouses to which it had no access, the court expressly found that petitioner's "personnel had access to these warehouses at all times, subject to finding authorized Army personnel to unlock the warehouses" (Fdg. 16, Pet. App. 28). These findings are supported by the record and in turn fully support the court's conclusion "that the evidence fails to establish a taking of plaintiff's property for which recovery can be had * * *" (Pet. App. 13).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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